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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 322.

THE UNITED STATES, APPELLANT,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

No. 323.

THE CHICKASAW FREEDMEN, APPELLANTS,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

BRIEF ON BEHALF OF THE CHOCTAW NATION AND THE CHICKASAW NATION, APPELLEES.

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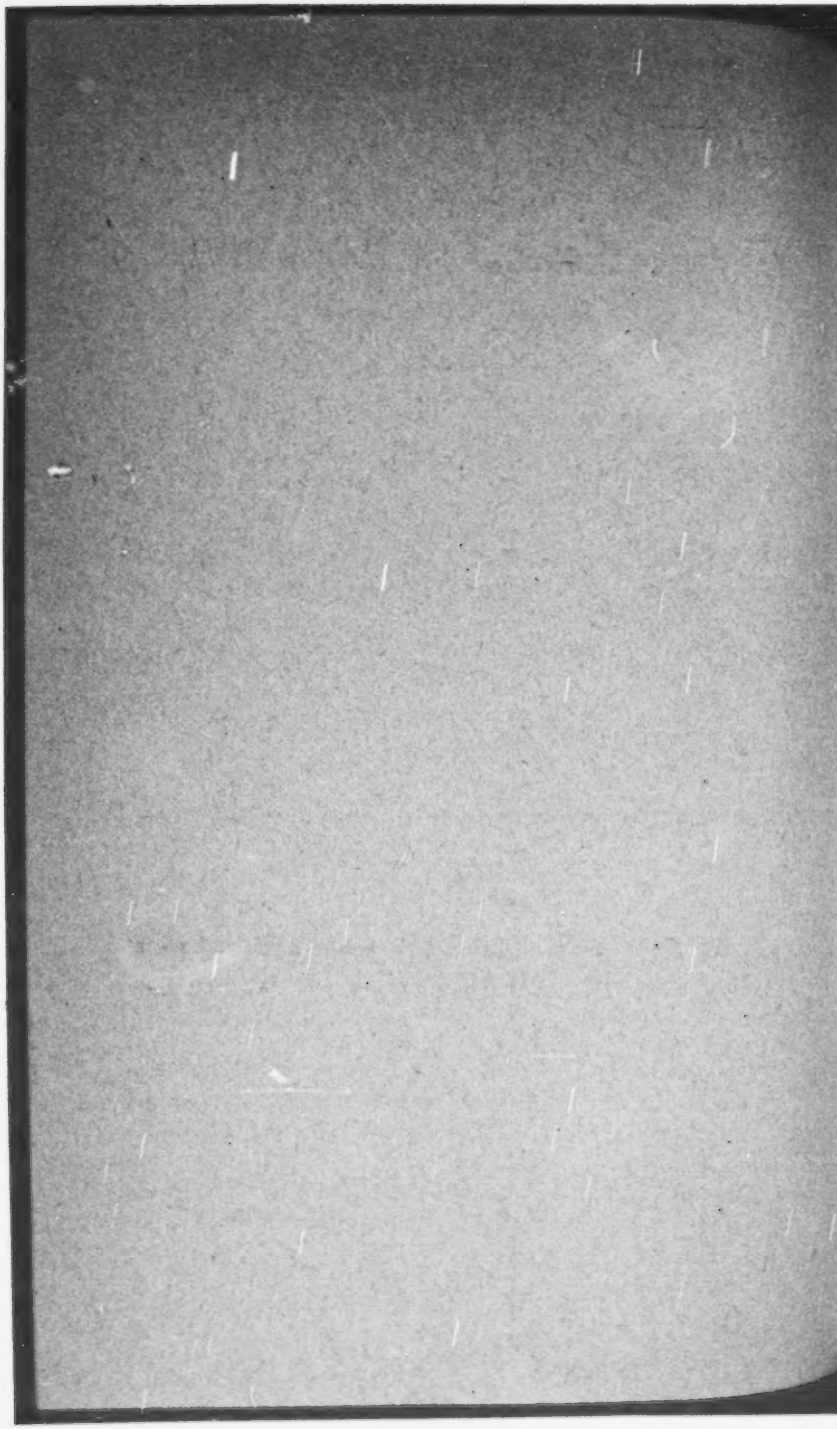

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BRIEF FOR THE CHOCTAW AND CHICKASAW NATIONS.

This is an appeal, taken by the United States and the Chickasaw Freedmen, from a decree rendered against them, in the Court of Claims of the United States, on April 27, 1903 (*R., 30–31*).

The opinion of the Court of Claims was delivered by Wright, J., and is set forth at length in the record (*pages 23–30*).

This action was commenced in the Court of Claims by a bill of interpleader filed by the United States under the following provisions of the agreement between the United States and the Choctaw and Chickasaw Nations entered into on the twenty-first day of March, 1902, and ratified and confirmed by the act of Congress approved July first, nineteen hundred and two (*32 Stats., 649*), to-wit:

> "SECTION 36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw Freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw Nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw Nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.
>
> "SECTION 37. To that end the Attorney General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw Nations and the Chickasaw Freedmen setting forth the existing controversy between the Chickasaw Nation and the Chickasaw Freedmen and praying that the defendants thereto be required to interplead and settle their respective rights in such suit.
>
> "SECTION 38. Service of process in the suit may be had on the Choctaw and Chickasaw Nations, respectively, by serving upon the principal chief of the former and the governor of the latter a certified copy of the bill, with a notice of the time for answering the same, which shall not be less than thirty nor more than sixty days after such service, and may be had upon the Chickasaw Freedmen by serving upon each of three known and recognized Chickasaw Freedmen a certified copy of the bill, with a like notice of the time for answering the same, and by publishing a notice of the commencement of the suit, setting forth the nature and prayer of the bill, with the time for answering the same, for a period of three

weeks in at least two weekly newspapers, having general circulation in the Chickasaw Nation.

"SECTION 39. The Choctaw and Chickasaw Nations, respectively, may in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive of the Revised Statutes, employ counsel to represent them in such suit and protect their interest therein; and the Secretary of the Interior shall employ competent counsel to represent the Chickasaw Freedmen in said suit and protect their interests therein; and the compensation of counsel so employed for the Chickasaw Freedmen, including all costs of printing their briefs and other incidental expenses on their part, not exceeding six thousand dollars, shall be paid out of the Treasury of the United States upon certificate of the Secretary of the Interior, setting forth the employment and the terms thereof and stating that the required services have been duly rendered; and any party feeling aggrieved at the decree of the Court of Claims, or any part thereof, may, within sixty days after the rendition thereof, appeal to the Supreme Court, and in each of said courts, the suit shall be advanced for hearing and decision at the earliest practicable time.

"SECTION 40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw Freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw Freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw Freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw Nations, according to their respective interests, and against the United States for the value of the lands so allotted to the Chickasaw Freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment which decree shall take

the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw Nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

The sole question to be determined by the Court of Claims was:

> "What action has the Chickasaw Nation lawfully taken under the provisions of article three of the treaty between the United States and the Choctaw and Chickasaw Nations, concluded April 28, 1866, and proclaimed July 10, 1866, in regard to the Chickasaw Freedmen?"

Articles 2, 3, and 4 of said treaty are as follows:

"ARTICLE II.

> "The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted in accordance with laws applicable to all members of the particular nation shall ever exist in said nations.

"ARTICLE III.

> "The Choctaws and Chickasaws in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the ninety-eighth degree west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent., in trust for the said

nations, until the legislatures of the Choctaw and Chickasaw Nations, respectively shall have made such laws, rules and regulations as may be necessary to give all persons of African descent resident in said nations at the date of the treaty of Fort Smith, and their descendants heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to said nations respectively; and also to give to each such person who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land after the Choctaws and Chickasaws and Kansas Indians have made their selections, as herein provided; and immediately on the enactment of such laws, rules and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars *per capita* as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of said two years to remove from said nations all such persons of African descent as may be willing to move; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars

or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

"ARTICLE IV.

"The said nations further agree that all negroes, not otherwise disqualified or disabled, shall be competent witnesses in all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary, notwithstanding, and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contract for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws and negroes and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected against injury; and they further agree that while the said freedmen, now in the Choctaw and Chickasaw Nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with the existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid."

Under the foregoing articles of the treaty of 1866, the Chickasaw Nation could, at its option, within two years from July 10, 1866, through its legislature, make the "laws, rules, and regulations," provided for and receive the sum therein mentioned, or could fail or refuse to do so, in which event said sum of money was to be held in trust by the United States for

". . . such of said persons of African descent as the United States shall remove from the said ter-

> ritory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of said two years, to remove from said nations all such persons of African descent as may be willing to move, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in said nations."

In the event the Chickasaw Nation had accepted the first alternative, then, under the law vesting the Court of Claims with jurisdiction, the Choctaw and Chickasaw Nations could not have recovered in this action.

> ". . . and in the event that it shall be finally determined in said suit that the Chickasaw Freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw Nations according to their respective interests and against the United States, for the value of the lands so allotted to the Chickasaw Freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw Nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

The question to be determined by the Court of Claims and the extent of its jurisdiction is clearly defined by the foregoing provisions of section 40, of the act of Congress approved July 1, 1902 (32 Stats., 649).

WHAT LAWFUL ACTION WAS TAKEN BY THE LEGISLATURE OF THE CHICKASAW NATION UNDER THE PROVISIONS OF ARTICLE 3 OF THE TREATY OF 1866 IN REGARD TO CHICKASAW FREEDMEN?

An examination of article 3 of the treaty of 1866 will show clearly that the United States presented two alternatives to the Chickasaw Nation, to wit:

First. The nation might, through its legislature, within two years from July 10, 1866, make the "laws, rules, and regulations" required by the provisions of article 3, of the treaty, and receive its proportion of the sum of three hundred thousand dollars.

Second. It could fail or refuse to make such "laws, rules, and regulations" and incur the forfeiture of its proportionate share of said sum of money.

The matter was optional with the Chickasaw Nation. Which alternative did it choose?

The Chickasaw Nation had no power to take any action which would bind either of the defendant nations after July 10, 1868, under the provisions of article 3 of said treaty; and the only action taken by the legislature of the Chickasaw Nation, within two years from July 10, 1866, the date of the treaty, was by legislative act passed on November 9, 1866, as follows:

> "SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That whereas, a treaty was concluded at Washington city on the 28th of April, 1866, by commissioners duly appointed on the part of the Chickasaws, Choctaws and the United States Government, which said treaty was ratified with amendments by the United States Senate and confirmed by the President, the Chickasaw legislature does hereby

consent, and confirm the said treaty and amendments made by the Senate of the United States.

"SECTION 2. . . .

"SECTION 3. *Be it further enacted*, That the provisions contained in article 3d of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars named for the use and benefit of the Chickasaws, or passing such laws, rules, and regulations, as will give all persons of African descent certain rights and privileges, be, and is hereby declared to be the unanimous consent of the Chickasaw legislature; that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes. And the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation, that the Government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the 3d article of the treaty of April 28th, 1866."

This was the answer of the Chickasaw Nation to the proposition presented to them by article 3, of the treaty of July 10, 1866, and this answer was given on November 9, 1866, only four months after the date of the treaty, while the matter was fresh in the minds of the Chickasaw people. No other action was taken by either the Chickasaw Nation or the United States until July 23, 1868, thirteen days after the expiration of the two years, from July 10, 1866, when the Secretary of the Interior addressed to the President *pro tempore* of the United States Senate, an official communication which contained the following paragraph:

"Two years from the ratification of the treaty having expired, and the legislatures of the Choctaw and Chickasaw Nations having failed to make such laws, rules, and regulations in regard to said persons of African descent resident in said nations at the date of the treaty of April 28, 1866, it becomes the duty of

the United States, within ninety days from the expiration of the said two years to remove from said nations all such persons of African descent as may be willing to remove."

On the seventeenth of August, 1868, the following official communication was presented to the Commissioner of Indian Affairs by the Chickasaw commissioner and attorney general of the Choctaw Nation:

"WASHINGTON, *August* 17, 1868.

"SIR: The undersigned respectfully call your attention to the provisions contained in article 3 of the treaty made and concluded at the city of Washington on the 28th day of April, A. D. 1866, between the United States, and the Choctaw and Chickasaw Nations of Indians, and to notify you that the Choctaws and Chickasaws have not made within the two years prescribed such laws, rules and regulations as are necessary to give all persons of African descent resident in said nation at the date of the treaty of Fort Smith and their descendants heretofore held in slavery among said nations all the rights, privileges and immunities, including the right of suffrage, of citizens of said nations, respectively, and the right to forty acres of land each, to be selected and held on the same terms as the Choctaws and Chickasaws are to select and hold their lands. On the contrary, as appears by the files of your office, the legislative councils of both nations have expressed a desire that the Government of the United States shall, with the least possible delay, carry into effect the stipulations contained in said third article of said treaty in reference to the removal of said persons of African descent from the limits of the Choctaw and Chickasaw country.

"We are, sir, respectfully, your obedient servants,

"HOLMES COLBERT,
"*Chickasaw Commissioner.*
"SAMPSON FOLSOM,
"*Attorney General Choctaw Nation.*

"Hon. N. G. TAYLOR,
"*Commissioner of Indian Affairs.*"

On November 9, 1870, the governor of the Chickasaw Nation, in pursuance of the action of the legislature issued the following proclamation:

> "*Whereas*, it having become necessary, under the treaty of April 28th, 1866, that the freedmen were put upon the same footing with the other citizens of the United States, I, William P. Brown, governor of the Chickasaw Nation, do this day issue this, my proclamation, requiring all freedmen who are living within the limits of the Chickasaw Nation to obtain 'permits,' as is required by the laws of the Chickasaw Nation (of the citizens of the United States) by the first day of January A. D. 1871.
>
> "Given under my hand and seal of office this the 9th day of November, A. D. 1870.
>
> "WM. P. BROWN,
>
> "*Governor Chickasaw Nation.*"

The lands embraced within the limits of the Choctaw and Chickasaw Nations belong to the members of said tribes, the character of their holding being fixed by the following provision of article 1 of the treaty entered into on the 22d day of June, 1855, between the United States and the Choctaw and Chickasaw Nations:

> "And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however*, No part thereof shall ever be sold without the consent of both tribes; and that said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

We take it no argument is necessary to support the proposition that the Chickasaw legislature had no power after the expiration of the two years from July 10, 1866, the date of

said treaty, to take any action affecting the property of both tribes. No such authority was conferred upon the Chickasaw Nation by any act of Congress and no such power existed in it.

It is apparent from an examination of article 3 of said treaty that the nature of the holding of said lands by said tribes was recognized by them and by the United States in making said treaty. Article 3 provides that such action shall be taken by the legislatures of the Choctaw and Chickasaw Nations "respectively," and the same language is used in speaking of the alternative of said proposition. The action of the legislatures of the Choctaw and Chickasaw Nations "respectively" must have been taken within two years from the date of said treaty, or it became the duty of the United States to carry out the provisions of said article, by removing from said nations, within ninety days, all those freedmen who were willing to remove. The remainder of said freedmen, under the provisions of said article 3, then stood "upon the same footing as other citizens of the United States in the said nations."

It is a familiar principle of law that the action taken by the parties to a contract is conclusive as to what was intended to be performed. Both the Choctaw and Chickasaw Nations and the United States have so construed this article of the treaty, as will be seen by reference to the action of the tribal authorities and the Secretary of the Interior cited herein.

Not only this but Congress recognized this fact by the following provision of the act of May 17, 1882 (22 Stat. at Large, page 73), to wit:

> "That the sum of ten thousand dollars is hereby appropriated, out of the three hundred thousand dollars reserved by the third article of the treaty with the Choctaws and Chickasaws concluded April eighth, eighteen hundred and sixty-six, for the purpose of educating freedmen in said tribes, to be expended

under the direction of the Secretary of the Interior, three-fourths thereof for the freedmen among the Choctaws, and one-fourth for the freedmen among the Chickasaws: *Provided*, That said sum of ten thousand dollars shall be deducted in like proportion from any moneys in this act appropriated to be paid said Choctaws and Chickasaws: *And provided further*, That either of said tribes may, before such expenditure adopt and provide for the freedmen in said tribe in accordance with said third article, and in such case the money herein provided for such education in said tribe shall be paid over to said tribe, to be taken from the unpaid balance of the three hundred thousand dollars due said tribe."

Here following the construction of the nations and the Interior Department is a declaration by Congress, nine years after the passage of the act of January 10, 1873, by the Chickasaw legislature (which counsel for the Chickasaw Freedmen relies upon) that the freedmen have not been adopted by either of said tribes, and presenting to them another proposition for the adoption of said freedmen.

The legislature of the Choctaw Nation, shortly afterward, to wit: on May 21, 1883, passed an act under the provisions of said act of Congress of May 17, 1882 (22 Stat. at Large, pages 72 and 73), adopting their freedmen. It will be noticed that while article 3 of the treaty of 1866 provides that action should be taken by the legislatures of said nations *respectively*, the act of May 17, 1882, provides that *either* of said tribes may take such action.

We respectfully submit that this is conclusive that the act of January 10, 1873, did not have the effect of adopting the Chickasaw Freedmen, under article 3 of said treaty; but we are not forced to rely on this alone. No action was ever taken by the Chickasaw legislature to adopt said freedmen under the authority conferred by the act of May 17, 1882 (Stat. at Large, 22, pages 72 and 73).

On the contrary, as we shall presently show, the Chickasaws repeatedly took just the contrary action and urged upon the United States the removal of said freedmen.

The act of the Chickasaw legislature of January 10, 1873, is as follows:

> "SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That all the negroes belonging to the Chickasaws at the time of the adoption of the treaty of Fort Smith, and living in the Chickasaw Nation at the date thereof, and their descendants, are hereby declared to be adopted in conformity with the third article of the treaty of 1866 between the Choctaws, Chickasaws, and the United States: *Provided, however*, That the proportional part of the $300,000 specified in article third of said treaty, with the accrued interest thereon, shall be paid to the Chickasaw Nation for its sole use and benefit: *And provided further*, The said adopted negroes of the Chickasaw Nation shall not participate in any part of said $300,000, nor be entitled to any benefit from the principal and interest on our invested funds or claims arising therefrom, nor to any part of our common domain, or the profits arising therefrom (except the forty acres *per capita* provided for in the third article of the treaty of 1866), nor to any privileges or rights not authorized by treaty stipulations: *And provided further*, That the said adopted negroes, upon the approval of this act, shall be subject to the jurisdiction and laws of the Chickasaw Nation and to trial and punishment for offenses against them in every case just as if the said negroes were Chickasaws.
>
> "SECTION 2. *And be it further enacted*, That this act shall be in full force and effect from and after its approval by the proper authority of the United States. And all laws or parts of laws in conflict with this act are hereby repealed."

It will be observed that this act was not passed within the two years provided by the treaty and is evidently not even an attempt to comply with its requirements. It imposes

new conditions and expressly withholds the consent of the Chickasaws to others imposed by that treaty. By its terms it could have no effect until approved "by the proper authority of the United States."

This act not having been approved "by the proper authority of the United States" on October 18, 1876, the Chickasaw legislature adopted the following resolution:

> "Whereas the governor of the Chickasaw Nation has recommended to this legislature that commissioners be sent on the part of the Chickasaw Nation, to confer with commissioners on the part of the Choctaw Nation in relation to the freedmen in said nations, and to agree with the Choctaws upon some plan for the final settlement of all questions relating to said freedmen;
>
> "And whereas it is understood that the governor is in favor of the removal of all freedmen, former slaves of the Choctaws and Chickasaws, from the limits of the Choctaw and Chickasaw country, and is of the opinion that the same may be accomplished: therefore,
>
> "SECTION 1. *Be it resolved by the legislature of the Chickasaw Nation*, That four commissioners, one from each county of the Chickasaw Nation, shall be elected by joint vote of the senate and house of representatives of the present session of the legislature, to visit the capital of the Choctaw Nation during the next regular session of the general council of said nation, with instructions to confer with commissioners on the part of the Choctaw Nation, and agree upon some plan *whereby the freedmen, former slaves of the Choctaws and Chickasaws and their descendants, shall be removed from and kept out of the limits of the Choctaw and Chickasaw country.*
>
> "SECTION 2. *Be it further resolved*, That the commissioners provided for in the foregoing section shall receive the same pay while actually engaged on the business of their mission, as members of the legislature and may appoint a secretary who shall receive the same pay as one of the commissioners; and said commissioners shall make a full report of all their

official proceedings to the legislature at the next meeting thereof.

"Approved Oct. 18th, 1876.

"B. F. OVERTON, *Governor.*"

At the next session of the Chickasaw legislature, on October 17, 1877, an act was passed containing the following provision:

"SECTION 3. *Be it further enacted*, That the provisions contained in article 3, of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit, on passing such laws, rules, and regulations as will give all persons of African descent certain rights and privileges, be, and it is hereby, declared to be the unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes, and the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation that the Government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the third article of the treaty of April 28, 1866.

"Approved October 17, 1877.

"B. F. OVERTON, *Governor.*"

This act was evidently passed in view of all that had occurred and of information given the legislature by the commissioners appointed by the resolution of October 18, 1876, and certainly repeals the act of January 10, 1873, if any repeal was needed, which we do not admit, said act never having become a law by reason of the failure of the "proper authority of the United States" to approve it.

On May 6, 1882, an act of the Chickasaw legislature was approved containing the following provision:

"SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That Wm. L. Byrd and B. F. Overton, delegates of the Chickasaw Nation, are hereby fully authorized and directed to enter their protest in behalf of the Chickasaw Nation against the ratifying by Congress of the United States of an act passed by the general council of the Choctaw Nation adopting and granting to the freedmen of the Choctaw Nation full rights of citizenship without conferring with the Chickasaws, or obtaining their consent to said adoption; and said delegates are hereby fully authorized and directed to represent the Chickasaw people in any and all measures that might be presented before the Department and Congress of the United States affecting the interest of our people and country."

On the 22d of October, 1885, evidently in response to the proposition of the United States contained in the act of May 17, 1882, an act of the Chickasaw legislature was approved containing the following provision:

"SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That the Chickasaw people hereby refuse to accept the freedmen as citizens of the Chickasaw Nation upon any terms or conditions whatever, and respectfully request the governor of our nation to notify the Department at Washington of the action of the legislature in the premises."

The Indian appropriation act of August 15, 1894, contained the following provision:

"SECTION 18. That the approval of Congress is hereby given to 'An act to adopt the negroes of the Chickasaw Nation' and so forth, passed by the legislature of the Chickasaw Nation and approved by the governor thereof January tenth, eighteen hundred and seventy-three, particularly set forth in a letter from the Secretary of the Interior, transmitting to Congress a copy of the aforesaid act, contained in House Executive Document numbered two hundred and seven, Forty-second Congress, third session (28 Stat., 336)."

The Chickasaw statute, relating to the adoption of the freedmen, was enacted five years after the expiration of the period of two years limited in the third article of the treaty of 1866. According to its terms, it was to take "effect from and after its approval by the proper authority of the United States." It was not enacted in pursuance of the scheme defined in the treaty of 1866, which limited the option, therein granted, to a period of two years from the date of the treaty. If it had been promptly approved by the United States, the result would not have been to secure to the Chickasaws any part of the sum of $300,000 mentioned in the treaty, unless the Choctaws had adopted their freedmen and the United States had extended the option which expired in 1868. The Choctaws did not adopt their freedmen until eight years after the passage of the Chickasaw act of 1873. Twenty-one years after its passage, Congress enacted a law purporting to approve the Chickasaw act of 1873.

Every statute is, by implication, a repeal of all prior statutes, so far as it is repugnant thereto. Five years before the Choctaws adopted their freedmen, and eighteen years before Congress enacted the law of 1894, the Chickasaw law of 1873 was repealed by the repugnant act approved October 18, 1876. If the act of 1873 had not been repealed by the act of 1876, it would have been repealed by the repugnant act approved October 17, 1877. If it had not been repealed by the act of 1876, or by the act of 1877, it would have been repealed by the repugnant act approved May 6, 1882. And, finally, if it had not been repealed by either of the three acts last mentioned, it would have been repealed by the repugnant act approved October 22, 1885. And yet, notwithstanding this repeal so strongly re-enforced and emphasized, notwithstanding the vigorous protest made in the act of May 6, 1882, Congress, evidently in ignorance of the facts of the case, enacted the law of August 15, 1894, approving a Chickasaw statute, which had been dead and buried eighteen years.

By subsequent acts of the Chickasaw legislature, the proposition embraced in the Chickasaw statute of January 10, 1873, was withdrawn from the cognizance of Congress. It was not thereafter in the power of Congress to galvanize into life the dead Chickasaw statute. The act of August 15, 1894, was passed in profound ignorance of the fact that the Chickasaw act of 1873 had long before 1894 been repealed by repugnant legislation.

We submit that the act of Congress approved August 15, 1894, did not ratify or confirm anything. There was nothing in existence for it to ratify or confirm. It is hardly necessary to add that it was not and did not purport to be in itself a grant of Chickasaw citizenship to Chickasaw Freedmen.

The Secretary of the Interior has had occasion to decide the question now under consideration. As an authority, it is possible that his decision may not have equal weight, in this court, with the decision of a judicial tribunal. But it certainly is legitimate and proper to present it for the consideration of the court. It is as follows:

> "November 9, 1866, the Chickasaws, by act of their legislature, requested the United States to remove the freedmen from the limits of the Chickasaw Nation, according to the alternative provision therefor in the third article of the treaty of 1866; but no action was taken upon this request. January 10, 1873, the Chickasaws, by an act of their legislature, adopted the freedmen 'in conformity with the third article of the treaty;' but the act contained other provisions intended to explain and define the extent of the adoption, and, by its terms, was to have 'force and effect from and after its approval by the proper authority of the United States.' A copy of this last act was transmitted to Congress by the Secretary of the Interior, as shown by House Ex. Doc. No. 207, 42d Cong., 3d sess.; but no other action was taken thereon until August 15, 1894. In the meantime the Chickasaw legislature had passed

the act of October 22, 1885, declaring 'that the Chickasaw people hereby refuse to accept or adopt the freedmen, as citizens of the Chickasaw Nation, on any terms or conditions whatever, and respectfully request the governor of our nation to notify the Department at Washington of the action of the legislature in the premises.' This act of the Chickasaw legislature was both preceded and followed by memorials and other communications from the Chickasaws, entreating the United States to carry into effect the alternative provision of the third article of the treaty respecting the removal of the freedmen from the nation. (See Senate Ex. Doc. No. 166, 50th Cong., 1st sess., and Senate Doc. No. 84, 55th Cong., 2nd sess.)

"The Indian appropriation act of August 15, 1894 (28 Stat., 286, 336), contains the following:

"'SEC. 18. That the approval of Congress is hereby given "An act to adopt the negroes of the Chickasaw Nation" and so forth, passed by the legislature of the Chickasaw Nation, and approved by the governor thereof January tenth, eighteen hundred and seventy-three, particularly set forth in a letter from the Secretary of the Interior, transmitting to Congress a copy of the aforesaid act, contained in House Executive Document numbered two hundred and seven, Forty-second Congress, third session.'

"The language of this provision is not such as would be appropriate to the enactment of original legislation, such as an adoption of the freedmen into the Chickasaw tribe by congressional enactment, against the consent of the tribe. The terms employed harmonize better with a purpose to merely assent to, or sanction, an act of the tribal legislature supposed to be awaiting assent, or sanction, by Congress. The words used are those of approval and acquiescence, and not those of creation or command. Furthermore, the adoption of the freedmen was not absolutely required by the treaty stipulations of 1866, but, by the terms of that treaty, it was left to the option and discretion of the tribal legislature. If the tribe, by such laws, rules and regulations as might be necessary, gave to the freedmen all the rights, privileges, and

immunities, including the right of suffrage, of citizens of the tribe, except in the annuities, moneys, and public domain of the tribe, and also gave to the freedmen forty acres each of the land of the tribe, on the same terms as the Chickasaws, then certain money was to be paid, by the United States, to the Chickasaw Nation, less such sum, at the rate of one hundred dollars *per capita*, as would be sufficient to pay such freedmen as, within ninety days after the passage of such laws, rules, and regulations, should elect to remove and actually remove from the nation. If such adoption was not made by the tribal legislature within two years from the ratification of the treaty, the money was to be paid by the United States, for the use and benefit of such of the freedmen, as the United States should remove from the Chickasaw Nation, and in that event, the United States agreed, within ninety days after the expiration of said two years, to remove from the nation all such freedmen, as were willing to remove, those remaining or returning after having been removed from the nation, to have no benefit of said money, and to be upon the same footing as other citizens of the United States in said nation.

"While a law of Congress is upon the same footing as a treaty, and will repeal provisions in a pre-existing treaty which are inconsistent therewith, still a repeal will not occur by implication, unless the inconsistency is such that the treaty provision and the act of Congress cannot stand together. There is nothing in the act of August 15, 1894, which shows an intention to withdraw and take from the Chickasaw legislature the option and discretion given by the treaty, respecting the adoption of the freedmen. There is no necessary repugnancy between the treaty and the later congressional enactment, and, therefore, there is no repeal.

"Was the Chickasaw act of January 10, 1873, open to approval, when Congress assented thereto, on August 15, 1894, or had the Chickasaws repealed that act, and withdrawn the proposed adoption of the freedmen? The Chickasaws had not expressly repealed the adopting act; but the subsequent Chick-

asaw act of October 22, 1885, declared that the Chickasaws thereby refused 'to accept or adopt the freedmen, as citizens of the Chickasaw Nation, upon any terms or conditions whatever.' Words could not have been employed, which would have been more repugnant to, or inconsistent with, the terms of the adopting act. The two acts are so completely at variance that both cannot exist together; and therefore the one which contains the latest expression of the legislative will controls and operates as a repeal of the other. When, therefore, Congress passed the act of August 15, 1894, there was no act of the Chickasaw legislature upon which it could operate. The Chickasaw act of adoption was not to become effective until approved by the proper authority of the United States and, since at the time of its repeal such approval had not been given, there seems to be no doubt of the authority of the Chickasaws to withdraw it.

"I am, therefore, of opinion that the Chickasaw Freedmen are not members of that tribe, within the meaning of the provision of the agreement submitting the amended agreement to a vote of the male members of the tribe qualified to vote under tribal laws.

"Very respectfully,

"WILLIS VAN DEVANTER,
"*Assistant Attorney General.*

"DEPARTMENT OF THE INTERIOR, *August* 9, 1898.

"Approved:
"C. N. BLISS, *Secretary.*"

We respectfully submit that the opinion of the honorable Assistant Attorney General is sound and gives to the acts of the Chickasaw legislature and Congress that construction which is proper and consistent with good faith on the part of the Government in dealing with its wards.

Technical rules of construction should never be adopted in such cases, but that construction should be given which would carry into effect the evident intention of the parties. (See vol. 2, Opinions of Attorneys General, 465.)

We respectfully submit that the judgment and decree of the Court of Claims of the United States should be in all things affirmed.

MANSFIELD, MCMURRAY AND CORNISH,
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The Chickasaw Nation, Appellees.

A. A. HOEHLING, JR.,
Of Counsel.

WASHINGTON, D. C., *January* 22, 1904.

NOTE.—At the time of the preparation and printing of the foregoing brief, counsel for appellees have not been furnished with appellants' brief; for which reason counsel reserve the right to make such further reply herein, oral or printed, as may hereafter appear appropriate and necessary.